

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

I.T.R. No. 101 of 1997
Date of Decision: 23.7.2007

The Commissioner of Income-tax, Jalandhar

....Applicant

Versus

M/s Decent Dyeing Co., Ludhiana

...Respondent.

CORAM:- HON'BLE MR. JUSTICE M.M. KUMAR.

HON'BLE MR. JUSTICE AJAY KUMAR MITTAL.

PRESENT: Mr. Sanjiv Bansal, Advocate for the Revenue.

AJAY KUMAR MITTAL, J.

This reference under Section 256 (1) of the Income Tax Act, 1961 (for short “the Act”) has been made to this Court at the instance of the revenue by the Income Tax Appellate Tribunal, Chandigarh Bench, Chandigarh (for brevity “the Tribunal”) arising out of its order dated 21.5.1996 in I.T.A. No. 937/Chandi/90 relating to the assessment year 1982-83 raising the following question of law:-

“Whether, on the facts and in the circumstances of the case, the ITAT is right in law to delete the penalty amounting to Rs.1,76,982/- levied u/s 271 (1)(c) for the assessment year 1982-83?”

The facts are that the assessee filed its original return declaring income of Rs.41,693/- for the assessment year 1982-83 and the Assessing Officer while examining the books of account found the following discrepancies:-

- “i) Truck expenses as per ledger were of the order of Rs.15,353/- whereas there were debited at Rs.24,360/- in the profit and loss account;
- ii) Auto rickshaw expenses as per the ledger came to Rs.4,170/- as against the debit in the profit and loss account of Rs.12,627/-;
- iii) Wages as per the ledger amounted to Rs.41,077/- whereas in profit and loss account, these were claimed at Rs.97,380/-;
- iv) Professional charges as per ledger came to Rs.1230/- as against the claim made in the profit and loss account at Rs.5575/-.”

Upon this, the assessee revised its trading and profit and loss account and reduced the net profit from Rs.1,64,911/- to Rs.1,38,007/-. After it, the assessee was directed to get its account audited by the special auditors under Section 142 (2A) of the Act. Upon audit, the auditors worked out the gross profit at Rs.4,49,086/- and the net profit at Rs.1,43,279/-. On the basis of the audit note, the Assessing Officer held that the books of accounts of the assessee were neither complete nor correct and worked out the net profit at Rs.3,80,617/- vide order dated 5.7.1985. The said assessment order was set aside by the CIT (A). The assessee filed another return on 31.3.1986 under the Amnesty Scheme wherein gross profit was shown at Rs.4,51,000/- and net income was declared at Rs.1,96,604/-. On re-examination, the income was computed at Rs.2,60,497/- before the claim of depreciation. Besides the aforesaid income of Rs.2,60,497/-, the Assessing Officer made an addition of Rs.1,44,521/- in respect of certain unexplained credits. In this view, the total income of the

assessee was computed at Rs.3,22,655/- and no appeal against the quantum of assessment was filed. The Assessing Officer levied a penalty of Rs.2,76,658/- upon the assessee for filing inaccurate particulars of income and for concealing the income under Section 271 (1)(c) of the Act in respect of the following items of income:-

i)	Under statement of business income	69,556
ii)	Under statement of business income for bogus claim of investment allowance	25,830
iii)	Under statement of business income by excessive claim of depreciation	36,751
iv)	Unexplained credits	1,44,751
		2,76,658

A penalty of Rs.1,76,982/- was levied by the Assessing Officer. Upon appeal by the assessee, the first appellate authority vide order dated 21.3.1990 held that all penalties were leviable except penalty of Rs.69,556/-. Against the order dated 21.3.1990 passed by the CIT (A), the assessee filed appeal against the part confirmation of penalty and the revenue filed the appeal against the exclusion of addition of Rs.69,556/- for the purpose of levy of penalty under Section 271 (1)(c) of the Act. The Tribunal dismissed the appeal filed by the revenue and allowed the appeal of the assessee by deleting the entire penalty of Rs.1,76,982/- vide its order dated 21.6.1996.

No one has appeared on behalf of the assessee to oppose the reference.

We have heard learned counsel for the revenue.

Learned counsel for the revenue contended that the Tribunal had wrongly held that the Assessing Officer has not invoked the Explanations to Section 271 (1)(c) of the Act but has gone by the

main provisions of the said section. Learned counsel submitted that once the proceedings were initiated for penalty under Section 271 (1) (c) of the Act, the Explanations appended to the said section being part of the section were applicable. Learned counsel further submitted that the Explanations raised certain presumptions against the assessee and the onus was on the assessee to prove that there was no concealment of income.

The matter is not res integra and the Apex Court in **K.P.Madhusudhanan v. Commissioner of Income-tax, 251 ITR 99** had specifically held as under:-

“...The Explanation to section 271 (1)(c) is a part of section 271. When the Income-tax Officer or the Appellate Assistant Commissioner issues to an assessee a notice under section 271, he makes the assessee aware that the provisions thereof are to be used against him. These provisions include the Explanation. By reason of the Explanation, where the total income returned by the assessee is less than 80 per cent, of the total income assessed under section 143 or 144 or 147, reduced to the extent therein provided, the assessee is deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof, unless he proves that the failure to return the correct income did not arise from any fraud or neglect on his part. The assessee is, therefore, by virtue of the notice under section 271 put to notice that if he does not prove, in the circumstances stated in the Explanation, that his failure to return his correct income was not due to fraud or

neglect, he shall be deemed to have concealed the particulars of his income or furnished inaccurate particulars thereof and, consequently, be liable to the penalty provided by that section. No express invocation of the Explanation to section 271 in the notice under section 271 is, in our view, necessary before the provisions of the Explanation therein are applied. The High Court at Bombay was, therefore, in error in the view that it took and the Division Bench in the impugned judgment was right.”

The Tribunal proceeded on the basis that the Assessing Officer had not invoked the Explanations to Section 271 (1)(c) of the Act but had gone by the main provisions of the said section and, therefore, the presumptions against the assessee in these Explanations were not available to the revenue and onus, thus, lay on the revenue to prove the charge of concealment.

In view of the clear enunciation of law by the Apex Court in K.P.Madhusudhanan's case (supra) the Tribunal was not right in law in placing initial onus on the revenue and holding that the revenue had failed to prove the charge of concealment and, therefore, deletion of penalty on that basis for the assessment year in question was not justified. The reference stands answered accordingly.

**(AJAY KUMAR MITTAL
JUDGE**

July 23, 2007
gbs

**(M.M. KUMAR)
JUDGE**